

**UNIFORM STATUS OF CHILDREN OF
ASSISTED CONCEPTION ACT**

Drafted by the

**NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS**

and by it

**APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES**

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UNIFORM STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT

PREFATORY NOTE

Nuclear energy was at once a breakthrough into untold wonders beyond the wildest hopes and dreams of its mentors, yet its use and development has been resisted by some as an uncontrollable force which threatens incomprehensible destruction. Nuclear energy, a force like many others, can be used for good and for evil, but once created it remains for the prudence or folly of mankind to direct its course. It is not likely ever to be eradicated.

Extraordinary progress in medical technology has produced veritable miracles many of which have been feared and rejected at first, with a master race contemplated by genetic engineering, vascularizing corpses with modern respirators, producing babies in test tubes, yet nuclear energy, genetic engineering, respirators, petrie dishes and other advances developed by human ingenuity are here to stay. Once out, the genie will never return to the bottle.

Ours is the responsibility to acknowledge the reality of these forces and with wisdom and prudence develop order and design in their use and implementation for the good of humanity.

This Conference is faced with the birth of many beautiful, innocent children brought into the world through certain extraordinary procedures which will ultimately require regulation, but meanwhile the status of these children demands our attention. These children are without traditional heritage, or parentage and other fundamentals, they are buffeted by forces beyond their comprehension and control. Although without guile or fault, but because of accident of birth, these children of the new biology have been deprived of certain basic rights.

Children then are the first priority, others can wait, at least until the children are taken care of. One cannot but acknowledge the reality of these extraordinary medical innovations created and developed to overcome the burden of infertility that literally be-devils our society.

An estimated one billion dollars was spent by Americans in the year of 1987 on medical care to combat infertility. Office visits for infertility services rose from \$600,000 in 1968 to about \$1.6 million in 1984 according to the report of the O.T.A.

It is likely that stringent regulatory legislation will become necessary in the near term to provide a social solution to deal with this scourge among those who are now looking with hope and expectation of fulfillment to the recent advances in medical technology. Some 600 surrogate mother arrangements have been concluded to date.

This Act “Status Of Children Under **Assisted Conception**” is not the complete answer to the overwhelming social problem. This Act is not a surrogacy regulatory act nor was it intended to be.

This Act has made only limited tangential use of so-called surrogacy components and then only to augment and clarify the rights of children born under the new technology as well as the rights of the parties to these arrangements.

It is extremely important for all to understand clearly the mandate which has guided the Drafting Committee in the preparation of this Act.

The Committee was given the responsibility to draft an act, a child oriented act, to provide order and design that would inure to the benefit of those children who have been born as a result of this new modern miracle. This was not to be a regulatory act. But the Conference did direct this Drafting Committee, by its almost unanimous vote, to proceed by making use of such limited and monitored surrogacy procedures as might be necessary to accomplish its mandate.

This Act was designed primarily to effect the security and well being of those children born and living in our midst as a result of assisted conception. The Executive Committee and the general Conference, considering the plight of these children, some with five parents, some with no father, some having no one responsible for support, nurturing, health, well being, or rights as a person or a member of society, determined that the greatest priority and first call on the energy and talent of the Drafting Committee was to provide an act which addressed these and other deficiencies.

The Drafting Committee has therefore with conscientious dedication addressed itself to the precise issue of the status of children, their rights, security, and well being. It is drawn with a narrow focus and in many instances, is limited by design to accommodate its mandate. You will find provisions which at first may appear arbitrary and seemingly inequitable, but there is not one word in this Act that was casually drafted.

The narrowness of the Act is designed to limit its applicability to what is best for children. The design of the limitation was also intended to strengthen the focus of this Act in the eyes of legislators and the public as prospective legislation

which is needed immediately to provide order, direction, and design with dignity to the unsettled lives of our target children.

Because this Act is sensitive to the treatment of all of the parties, especially the children, it is likely to be more readily accepted by legislators and the public than a full surrogacy regulatory act that is still meeting with intractable opposition in so many places.

Reference is hereby made to the shortness of the Act. It is intended to state clearly essential principles without inordinate elaboration or detailed regulatory procedures.

A woman who gives birth to a child is the child's mother.

A caveat is provided if bracketed Section 5 is to be included.

An alternative is available for those who will not accept even limited, supervised, judicially-guided surrogacy. That alternative provides that any surrogacy agreement, so-called, is void.

There was great urgency on the part of the Drafting Committee to provide a child with two parents, and this established a presumption of paternity in the husband of a married woman who bears a child through assisted conception placing the burden on the husband to show lack of consent.

A donor of sperm, however, is not to be considered the parent of a child conceived through assisted conception unless there has been some agreement beforehand.

We have given our child, conceived under assisted conception, virtually the same rights in property and inheritance as though conceived by natural means.

The bracketed Section 5 relating to limited surrogacy can be accepted or rejected by any jurisdiction. The Committee remains neutral neither opting for nor against surrogacy. The nonsurrogacy sections will stand alone and may be adopted without Section 5.

But for those states which choose to include Section 5, they will be edified by the serious detailed attention to matters which will preserve the best interests of the child, while at the same time developing order and balance in the rights and duties of the parties.

The Drafting Committee considered carefully the respective rights and duties of all parties in interest, the planning and review of all terms and components in the arrangement, the guidance, supervision, and direction of the court, the careful, thoughtful concern for those sensitive issues necessary to provide the greatest protection for the child. All of these and more were considered not only as providing substantial solutions for the problems of the children, but also as being most effective and likely to make a difference even among those who might ordinarily object to general surrogacy legislation.

It is the kind of act that addresses the very issue that troubles everyone – the rights of the child – because of this limited focus, we feel it will tend to eliminate the need for protracted litigation.

The process may in some instances seem to burden the court, and the intended parents must enter these arrangements fully prepared for certain exigencies and risk, but to assure the desired result there must be some burden, some inconvenience and even some risk when the life and well being of a child is in the balance.

The Committee made clear, positive choices in each instance to produce a child-oriented act. There was no boiler plate available to accomplish the task. The litany of restrictions, examinations, investigation, qualifications, and limitations as set out in Section 5 is purposeful in the prosecution of the mandate of the Committee although, in the eyes of some, a burden that may have a chilling effect on the success of the arrangement.

It is, however, through this narrow scope and focus, through these precise specific measures of guidance, limitation, control, and supervision we feel there can be developed a valid viable order that will provide for the best interests of the child and establish with clarity and dignity the rights of all parties in this extended family under Alternative A of this Act. This Act gives equal opportunity for those who are not prepared to accept the new technology. They may opt to elect Alternative B under the Act which will void any arrangement which contemplates surrogacy, so-called, or an agreement whereby a woman relinquishes her rights and duties as a parent of a child. The Act is intended to provide certain basic rights for children under either alterative arrangement.

UNIFORM STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT

SECTION 1. DEFINITIONS. In this [Act]:

(1) “Assisted conception” means a pregnancy resulting from (i) fertilizing an egg of a woman with sperm of a man by means other than sexual intercourse or (ii) implanting an embryo, but the term does not include the pregnancy of a wife resulting from fertilizing her egg with sperm of her husband.

(2) “Donor” means an individual [other than a surrogate] who produces egg or sperm used for assisted conception, whether or not a payment is made for the egg or sperm used, but does not include a woman who gives birth to a resulting child.

[(3) “Intended parents” means a man and woman, married to each other, who enter into an agreement under this [Act] providing that they will be the parents of a child born to a surrogate through assisted conception using egg or sperm of one or both of the intended parents.]

(4) “Surrogate” means an adult woman who enters into an agreement to bear a child conceived through assisted conception for intended parents.

Comment

The definition of “assisted conception” establishes the scope of coverage of this Act. It is intended to be a broad definition. Section 1(1)(i) includes both “traditional” artificial insemination with fertilization occurring inside the woman’s body and *in vitro* fertilization in which the joinder of sperm and egg takes place outside the body. Section 1(1)(ii) is designed to include within the definition the situation in which fertilization takes place through sexual intercourse and the resulting embryo is transplanted to the womb of another woman.

The final clause of Section 1(1) purposefully excludes husband-wife procreation from the definition of assisted conception. There are two reasons for this exclusion. First, as a policy matter, the rules pertaining to husband-wife procreation ought to be the same regardless of the means utilized for procreation. Thus, if a husband and wife choose to procreate through *in vitro* fertilization or more traditional artificial insemination, the status of the resulting child should be determined by existing laws, such as the Uniform Parentage Act, which govern the status of children produced by sexual intercourse. Second, the rules of this Act designating parentage and status of children are not always appropriate to husband-

wife procreation. For example, a husband ought not be permitted, through the use of artificial insemination, to claim the status of a nonparent donor under Section 4(a) of this Act. As a result of the exclusion in Section 1(1), he will not be permitted to claim that status.

It should be noted that while this Act is intended to govern the status of children of assisted conception, it is **not** intended to establish a regulatory scheme establishing the appropriate methods for the performance of such assisted conception. A jurisdiction may, *e.g.*, choose to enact separate regulations requiring genetic screening when assisted conception is undertaken, requiring that assisted conception be conducted only under certain conditions, etc.

While it may be suggested that the word “donor” ought properly to be limited to those who merely offer genetic material without compensation, Section 1(2) defines the term to include those who receive compensation for their genetic material. The term donor is regularly used to describe those who sell sperm to sperm banks. *See, e.g.*, Curie-Cohen, et. al, *Current Practice of Artificial Insemination by Donor*, 300 N. Eng. J. Med. 585 (1979). Also, those who sell their blood to blood banks are usually referred to as blood donors. *See, e.g.*, *Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707 (1985).

The bracketed language in Section 1(2) should be enacted only if the adopting jurisdiction selects Alternative A, *infra*, concerning surrogacy. The exception clause at the end of Section 1(2) makes it clear that a woman whose egg is fertilized through assisted conception and who bears the resulting child is not considered a donor. Under Section 2 of the Act she will be the mother of that child, unless a surrogacy arrangement has been approved under Alternative A.

The bracketed language which appears as Section 1(3) should be enacted only if the adopting jurisdiction selects Alternative A concerning surrogacy.

It should be emphasized that regardless of which alternative treatment of surrogacy agreements is chosen by a particular jurisdiction, Section 1(4) should be enacted. This subsection defines a surrogate. Regardless of what force, if any, an enacting jurisdiction chooses to give to surrogacy agreements, it is necessary to define what is meant by a surrogate.

SECTION 2. MATERNITY. [Except as provided in Sections 5 through 9,] a woman who gives birth to a child is the child’s mother.

Comment

The unbracketed language in this section codifies existing law concerning maternity and is made necessary only because of the existence and growing use of technology enabling a woman to give birth to a child to which she is not genetically related. This provision makes it clear that unless the enacting jurisdiction has adopted Alternative A, which in some circumstances designates someone other than the woman who gives birth as the mother, the woman who bears a child is the mother of that child. The bracketed language in this section should be enacted only if the adopting jurisdiction selects Alternative A concerning surrogacy.

SECTION 3. ASSISTED CONCEPTION BY MARRIED WOMAN.

[Except as provided in Sections 5 through 9,] the husband of a woman who bears a child through assisted conception is the father of the child, notwithstanding a declaration of invalidity or annulment of the marriage obtained after the assisted conception, unless within two years after learning of the child's birth he commences an action in which the mother and child are parties and in which it is determined that he did not consent to the assisted conception.

Comment

The presumptive paternity of the husband of a married woman who bears a child through assisted conception reflects a concern for the best interests of the children of assisted conception. Any uncertainty concerning the identity of the father of such a child ought to be shouldered by the married woman's husband rather than the child. Thus, the husband (not someone acting on his behalf such as a guardian, administrator or executor) has the obligation to file an action aimed at denying paternity through lack of consent to the assisted conception rather than the child or mother having an obligation to prove the husband's paternity.

It should be noted, however, that if the nonpaternity action is timely filed and the husband's lack of consent is demonstrated, the child will be without a legally-recognized father because the sperm donor is not the father under Section 4(a) of the Act. Also, because the filing of such a nonpaternity action is permitted within two years of the husband's learning of the child's birth, the period of uncertainty concerning the identity of the child's father will be longer than two years in the relatively rare case where the husband is not immediately made aware of the child's birth.

By designating the husband of a woman who bears a child through assisted conception as the father, it is intended that he will be considered the father for purposes of any cause of action which arises before the birth of the child. Thus, for

example, he would be the father under any state law authorizing a wrongful death action for the death of an unborn child during pregnancy.

The bracketed language in this section should be enacted only if the adopting jurisdiction selects Alternative A concerning surrogacy. Under that alternative, under certain circumstances the husband of the woman bearing the child will not be the father of the child. Instead, the man whose sperm was used in the creation of the child usually will be the father in such cases.

SECTION 4. PARENTAL STATUS OF DONORS AND DECEASED INDIVIDUALS. [Except as otherwise provided in Sections 5 through 9:]

(a) A donor is not a parent of a child conceived through assisted conception.

(b) An individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual's egg or sperm, is not a parent of the resulting child.

Comment

Present statutory law is split concerning the parental status of sperm donors. Fifteen states have statutes, patterned after Section 5(b) of the Uniform Parentage Act, specifying that a donor will not be considered the father of a child born of artificial insemination if the semen was provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife. Fifteen other statutes do not explicitly limit nonparenthood to situations where the semen is provided to a physician. Instead, they shield donors from parenthood in all situations where a married woman is artificially inseminated with her husband's consent.

Subsection 4(a), when read in light of Section 3, opts for the broader protection of donors provided by the latter group of statutes. That is, if a married woman bears a child of assisted conception through the use of a donor's sperm, the donor will not be the father and her husband will be the father unless and until his lack of consent to the assisted conception is proven within two years of his learning of the birth. This provides certainty for prospective donors. It should be noted, however, that under Section 4(a) nonparenthood is also provided for those donors who provide sperm for assisted conception by unmarried women. In that relatively rare situation, the child would have no legally recognized father. It should also be noted that Section 4(a) does not adopt the UPA's requirement that the donor

provide the semen to a licensed physician. This is not realistic in light of present practices in the field of artificial insemination.

In providing nonparenthood for “donors,” Section 4(a) includes by reference the definition of donor in Section 1(2) which covers those who provide sperm or eggs for assisted conception. Thus, if a woman provided an egg for assisted conception which resulted in another woman bearing the child, the egg donor would not be the child’s mother. This would provide no burden on the child in light of Section 2’s general rule declaring that the woman who gives birth to a child is that child’s mother.

Subsection 4(b) is designed to provide finality for the determination of parenthood of those whose genetic material is utilized in the procreation process after their death. The death of the person whose genetic material is either used in conceiving an embryo or in implanting an already existing embryo into a womb would end the potential parenthood of the deceased. The latter situation, in which cryopreservation is utilized to “freeze” an embryo which has been created *in vitro*, is already in existence and gave rise to much controversy in Australia in the early 1980’s.

A married couple died after having created an embryo through *in vitro* fertilization. Among the many questions raised after their simultaneous death in a plane crash was whether posthumous implantation of the embryo would result in children who would be those of the deceased couple. Under Section 4(b), it would be clear that implantation after the death of any genetic parent would not result in that genetic parent being the legally recognized parent. Clearly, under Section 2 of the Act, the woman who bears the child will be the mother. The paternity of such child would presumptively be that of the mother’s husband, if she is married, under Section 3 of the Act. For a discussion of recent Australian legislation in the area, see Corns, *Legal Regulation of In Vitro Fertilisation in Victoria*, 58 L. Inst. J. 838 (1984); Note, *Genesis Retold: Legal Issues Raised by the Cryopreservation of Preimplantation Human Embryos*, 36 Syr. L. Rev. 1021, 1029 n. 49 (1985).

Section 4(b) is the only provision of the Act which would deal with procreation by those who are married to each other. It is designed primarily to avoid the problems of intestate succession which could arise if the posthumous use of a person’s genetic material could lead to the deceased being termed a parent. Of course, those who want to explicitly provide for such children in their wills may do so.

The bracketed language at the beginning of this section should be adopted only by those jurisdictions enacting Alternative A concerning surrogacy. Under

that provision, certain persons who would otherwise be considered donors will be parents.

ALTERNATIVE A

Comment

A state that chooses Alternative A should also consider Section 1(3) and the bracketed language in Sections 1(2), 2, 3, and 4.

[SECTION 5. SURROGACY AGREEMENT.

(a) A surrogate, her husband, if she is married, and intended parents may enter into a written agreement whereby the surrogate relinquishes all her rights and duties as a parent of a child to be conceived through assisted conception, and the intended parents may become the parents of the child pursuant to Section 8.

(b) If the agreement is not approved by the court under Section 6 before conception, the agreement is void and the surrogate is the mother of a resulting child and the surrogate's husband, if a party to the agreement, is the father of the child. If the surrogate's husband is not a party to the agreement or the surrogate is unmarried, paternity of the child is governed by [the Uniform Parentage Act].

Comment

Because of the significant controversy concerning the appropriateness of arrangements under which a woman agrees to bear a child on behalf of another woman, this Act proposes two alternatives. Under Alternative A, in Sections 5 through 9, the adopting state is offered a framework under which such agreements are given effect under limited and prescribed circumstances. This alternative also outlines the parent-child relationships which are established when such agreements are approved by a court.

Alternative B, consisting of alternative Section 5, declares such agreements to be void and describes the parent-child relationships between any child born pursuant to such agreements and the other parties. The strong desire of some childless couples for a biologically-related child together with the technological capacity to utilize the sperm of a husband in impregnating a woman not his wife and the willingness of others to aid such couples in satisfying those desires creates a strong likelihood that such agreements will continue to be written. Therefore, it is

crucially important that a state enacting the Act adopt either Alternative A or Alternative B.

Under Section 5(a) of Alternative A, together with the definition of “intended parents” under Section 1(3), a valid surrogacy agreement requires the participation of two intended parents who are married to each other and a surrogate, who is defined by Section 1(4) as an **adult** woman who agrees to bear a child through assisted conception for the intended parents. If the surrogate is married, her husband must also be a party to the surrogacy agreement. Additional requirements for a surrogate and the intended parents are imposed by Section 6 of Alternative A. It should be noted that Section 5(a) simply authorizes such agreements. It does not give them effect in terms of designating parenthood, etc. In order to become effective in such matters, the agreement must be approved by the appropriate court under Section 6.

Section 5(b) makes clear that agreements which are not approved under Section 6 are void. Nonapproved agreements in a jurisdiction which has adopted Alternative A of the Act have the same effect as all surrogacy agreements under Alternative B. That is, the surrogate is the mother of any child of assisted conception born pursuant to such agreements. Her husband, if he is a party to such agreement, shall be the father. If the surrogate’s husband is not a party to such agreement or if she is unmarried, paternity of the child will be left to existing law.

SECTION 6. PETITION AND HEARING FOR APPROVAL OF SURROGACY AGREEMENT.

(a) The intended parents and the surrogate may file a petition in the [appropriate court] to approve a surrogacy agreement if one of them is a resident of this State. The surrogate’s husband, if she is married, must join in the petition. A copy of the agreement must be attached to the petition. The court shall name a [guardian ad litem] to represent the interests of a child to be conceived by the surrogate through assisted conception and [shall] [may] appoint counsel to represent the surrogate.

(b) The court shall hold a hearing on the petition and shall enter an order approving the surrogacy agreement, authorizing assisted conception for a period of 12 months after the date of the order, declaring the intended parents to be the parents of a child to be conceived through assisted conception pursuant to the agreement and discharging the guardian ad litem and attorney for the surrogate, upon finding that:

(1) the court has jurisdiction and all parties have submitted to its jurisdiction under subsection (e) and have agreed that the law of this State governs all matters arising under this [Act] and the agreement;

(2) the intended mother is unable to bear a child or is unable to do so without unreasonable risk to an unborn child or to the physical or mental health of the intended mother or child, and the finding is supported by medical evidence;

(3) the [relevant child-welfare agency] has made a home study of the intended parents and the surrogate and a copy of the report of the home study has been filed with the court;

(4) the intended parents, the surrogate, and the surrogate's husband, if she is married, meet the standards of fitness applicable to adoptive parents in this State;

(5) all parties have voluntarily entered into the agreement and understand its terms, nature, and meaning, and the effect of the proceeding;

(6) the surrogate has had at least one pregnancy and delivery and bearing another child will not pose an unreasonable risk to the unborn child or to the physical or mental health of the surrogate or the child, and this finding is supported by medical evidence;

(7) all parties have received counseling concerning the effect of the surrogacy by [a qualified health-care professional or social worker] and a report containing conclusions about the capacity of the parties to enter into and fulfill the agreement has been filed with the court;

(8) a report of the results of any medical or psychological examination or genetic screening agreed to by the parties or required by law has been filed with the court and made available to the parties;

(9) adequate provision has been made for all reasonable health-care costs associated with the surrogacy until the child's birth including responsibility for those costs if the agreement is terminated pursuant to Section 7; and

(10) the agreement will not be substantially detrimental to the interest of any of the affected individuals.

(c) Unless otherwise provided in the surrogacy agreement, all court costs, attorney's fees, and other costs and expenses associated with the proceeding must be assessed against the intended parents.

(d) Notwithstanding any other law concerning judicial proceedings or vital statistics, the court shall conduct all hearings and proceedings under this section in camera. The court shall keep all records of the proceedings confidential and subject to inspection under the same standards applicable to adoptions. At the request of any party, the court shall take steps necessary to ensure that the identities of the parties are not disclosed.

(e) The court conducting the proceedings has exclusive and continuing jurisdiction of all matters arising out of the surrogacy until a child born after entry of an order under this section is 180 days old.

Comment

Section 6, along with Section 8 which deals with parentage under an approved surrogacy, is the core of Alternative A. It provides for state involvement, through supervision by a court, in the surrogacy process before the assisted conception. The purpose of this early involvement is to insure that the parties are appropriate for a surrogacy arrangement, that they understand the consequences of what they are about to do and that the best interests of any child(ren) born of the surrogacy arrangement are considered before the arrangement is authorized.

The forum for state involvement is a petition brought by **all** the parties to the arrangement (including the surrogate's husband if she is married) in which the parties seek a judicial order authorizing the assisted conception contemplated by their agreement. The agreement itself must be submitted to the court. The court must hold a hearing on the petition and, under Section 6(b), must make ten separate findings before the surrogacy arrangement will be allowed to proceed. It should be noted that Section 6(b)(10) requires a finding that the arrangement would not be "substantially detrimental to the interest of any of the affected individuals." This insures the court will retain a measure of discretion to consider and utilize all relevant information.

This pre-conception authorization process is roughly analogous to adoption procedures currently in place in most jurisdictions. Just as adoption contemplates the transfer of parentage of a child from the natural to the adoptive parents, surrogacy involves the transfer from the surrogate to the intended parents. Section 6 is designed to protect the interests of the child(ren) to be born under the surrogacy arrangement as well as the surrogate and the intended parents. It should be noted that under Section 1(3) at least one of the intended parents will be genetically related to the child(ren) born of the arrangement.

Section 6 seeks to protect the interests of the child(ren) in several ways. The major protection of the interests of the child provided by the Act is the

authorization procedure itself. By providing for the court order authorizing the assisted conception and the surrogacy arrangement, the Act establishes closely supervised surrogacy as one of the methods to guarantee the security and well being of the child. Under Section 6(a), a guardian ad litem must be appointed to represent the interests of any child conceived through the surrogacy arrangement. An enacting jurisdiction may choose either mandatory or optional independent representation for the surrogate. Under Section 6(b)(3), the court will be informed of the results of a home study of both the intended parents and the surrogate. A study of the surrogate is required because of the possibility of termination of the agreement under Section 7 in which case the surrogate will be the legally recognized mother.

Further protection of the child is provided by the finding required by Section 6(b)(4) that both intended parents and surrogate (and her husband, if any) satisfy the standards of fitness required of adoptive parents. Under Section 6(b)(6), the court must assure itself, on the basis of medical evidence, that the pregnancy will not be dangerous to the child. While Section 6(b)(8) does not require any medical or genetic screening, it does mandate that if such testing is required by the agreement (or other law) the results will be available to the court and all parties. Section 6(b)(9) requires assurance that health-care costs during pregnancy have been provided. The provisions in Section 6(b)(1) and Section 6(e) dealing with exclusive jurisdiction is designed to minimize the possibility of parallel litigation in different states and the consequent risk of childnapping for strategic purposes.

The interests of the surrogate are also protected by Section 6. The bracketed version of Section 6(a) would require appointed counsel to represent her interests and, at the least, counsel will be permitted for her. The findings required by Section 6(b)(5) and Section 6(b)(7) will protect the surrogate against the possibility of overreaching or fraud. Under Section 6(b)(6), the court must find that the surrogate has had at least one previous pregnancy and delivery. Presumably such a finding helps insure that the surrogate fully understands the nature and experience of pregnancy. The court must also find the contemplated pregnancy and delivery would not pose unreasonable physical or mental health risks to her. The requirement of assurance of provision for health-care costs until birth imposed by Section 6(b)(9) protects the surrogate. Section 6(c) requires that all costs associated with the hearing be borne by the intended parents, unless otherwise provided in the agreement. If the agreement imposed such costs on the surrogate, the court could find, under Section 6(b)(10), that the agreement was not in the surrogate's interest and refuse to authorize it.

While most surrogacy arrangements apparently involve intended parents and surrogates who have met each other, if the surrogate does not want her identity revealed to the intended parents, she may request (under Section 6(d)) that the court

take all steps to insure that anonymity. At any event, Section 6(d) requires all proceedings to be held in camera with sealed records to insure confidentiality. It should be noted that in addition to the protections offered the surrogate by Section 6 at the hearing, she is given the right under Section 7 to terminate the agreement, even after it has been approved.

The intended parents (who are by definition **unable** to procreate through traditional means, Section 6(b)(2)) also have their interests protected through this section. In addition to the very existence of the court authorization procedure which gives effect to the surrogacy arrangement, Sections 6(b)(5), (6), and (7) help provide assurance to them that the surrogate is capable and is knowingly entering the arrangement. The interest of producing a healthy child is promoted through Section 6(b)(6)'s required finding that a pregnancy by the surrogate will not be unreasonably risky to the child.

Section 6, while constructing a detailed set of requirements for the petition and the findings which must be made before an authorizing order can be issued, nowhere states the consequences of violations of the rules. Because of the variety of types of violations which could possibly occur, it was felt that a bright-line rule concerning the effect of such violations was inappropriate. The question of the consequences of a failure to abide by the rules of Section 6 is left to a case-by-case determination. A court should be guided in making such a determination by the narrow purpose of Alternative A to permit surrogacy arrangements and the equities of a particular situation. Note that Section 7 provides a period for termination of the agreement and vacating of the order. The discovery of a failure to abide by the rules of Section 6 would certainly provide the occasion for terminating the agreement. On the other hand, if a failure to abide by the rules of Section 6 is discovered by a party during a time when Section 7 termination would be permissible, failure to terminate might be an appropriate reason to estop the party from later seeking to overturn or ignore the Section 6 order.

SECTION 7. TERMINATION OF SURROGACY AGREEMENT.

(a) After entry of an order under Section 6, but before the surrogate becomes pregnant through assisted conception, the court for cause, or the surrogate, her husband, or the intended parents may terminate the surrogacy agreement by giving written notice of termination to all other parties and filing notice of the termination with the court. Thereupon, the court shall vacate the order entered under Section 6.

(b) A surrogate who has provided an egg for the assisted conception pursuant to an agreement approved under Section 6 may terminate the agreement by

filing written notice with the court within 180 days after the last insemination pursuant to the agreement. Upon finding, after notice to the parties to the agreement and hearing, that the surrogate has voluntarily terminated the agreement and understands the nature, meaning, and effect of the termination, the court shall vacate the order entered under Section 6.

(c) The surrogate is not liable to the intended parents for terminating the agreement pursuant to this section.

Comment

Subsections (a) and (b) provide for termination of the surrogacy arrangement after the authorization order in two situations. Under subsection (a), any party or the court for cause may cancel the arrangement before the pregnancy has been established. This provides for a period of cancellation during a time when the interests of the parties would not be unduly prejudiced by such termination. By definition, the procreation process has not begun and, therefore, there is no interest to be asserted on behalf of the child. The intended parents certainly have an expectation interest during this time, but the nature of this interest is little different from that which they would have while they were attempting to create a pregnancy through traditional means.

Subsection (b) gives a surrogate who has provided the egg for the assisted conception 180 days after the last insemination to recant and decide to keep the child as her own. Under most current surrogacy arrangements, the surrogate will have provided the egg. The subsection requires that all parties to the agreement be given notice and that a hearing be held on a filing of an intent to terminate by the surrogate. Such notice, of course, must be provided in a constitutionally acceptable manner. If the court determines that the surrogate's termination is voluntary and she is aware of the consequences of such a termination (see Section 8(b)), it must vacate the authorization order.

This 180-day recantation period can, at one level, be described as a compromise between two polar positions concerning recantation. On one extreme, some argue that once the agreement has been presented to a court which has made the requisite findings under Section 6(b), no recantation should be permitted. After all, the surrogate has entered into an agreement to bear a child for the intended parents and the court has found that she acted knowingly and voluntarily and that she was an appropriate person to fulfill the role of surrogate. It would be argued that the expectation interests of the intended parents ought not be frustrated by the surrogate's unilateral action.

On the other hand, some argue that the surrogate ought to be able to renounce her agreement at any time until after the birth of the child. This position would assimilate the surrogate's rights to those of a birth mother who gives consent to the adoption of her child. Most current adoption statutes provide that valid consent can be given only after birth.

The selection of the 180-day recantation period, however, can be viewed as more than a mere mechanical compromise between the two positions. Instead, this recantation period can be explained by pointing out that the surrogacy arrangement is simply different from both the ordinary contract situation and the ordinary adoption situation and, therefore, ought to be treated differently. Surrogacy is not an ordinary contract because it contemplates the creation of a human being whose interests must be taken into account. It can be argued that the child's interests in a parent-child relationship with his or her biological mother are protected by giving her an extra 180 days to decide if she really wants to give up the child to the intended mother.

On the other hand, surrogacy is different from an adoption and the post-birth consent requirement of adoption is not appropriate for the surrogacy situation. The requirement of post-birth consent in adoption is based on the reality that many birth mothers are young, unmarried women who arrange **during pregnancy** to give their child up for adoption. It is felt that decisions made under such circumstances are often the result of emotional stress created by young women in the midst of an often unwanted pregnancy and, therefore, are pressured in inappropriate ways. Therefore, "pregnant women are irrebuttably presumed incapable of protecting their own interests." Ellman, Kurtz & Stanton, *Family Law: Cases, Text, Problems* 1238 (Michie 1986).

The surrogacy arrangement authorized under this Act is very different. Most importantly, the original decision to give up the child is made **before** the pregnancy by an adult woman who has already experienced a previous pregnancy. It is an arrangement which has been examined and approved by a court under Section 6, with all the protections of the surrogate provided under that section. Any undue pressure which may have been brought to bear on the surrogate to become a surrogate will have been examined at the Section 6 hearing.

Having rejected the contract and adoption analogies, the question of an appropriate time period for recantation remains. Section 7(b)'s 180-day recantation period roughly coincides with the time during which the surrogate has a constitutionally-protected right to terminate the pregnancy. Because the surrogate has this right to choose to **abort**, there is a certain logic in giving the same period in which to decide to **bear** the child and honor her pre-conception agreement. This recantation provision recognizes the right of the surrogate to change her mind well

into the pregnancy as well as the interests of the intended parents in the finality of the decision-making process before birth. Note that because the 180-day period begins on the date of the last insemination pursuant to the agreement (a point chosen because of its certainty), it is possible that the recantation period will extend longer than 180 days into pregnancy, if the pregnancy was actually created by an earlier insemination.

A jurisdiction which finds the 180-day period too short can choose not to enact Alternative A at all and opt for Alternative B which provides for no enforcement of surrogacy agreements.

Section 7(c) insures that a recanting surrogate will not be held liable in damages for her recantation, either under subsection (a) or (b). It is intended that no such liability for the surrogate for her recantation can be imposed by the agreement. By creating this immunity for the surrogate, this provision is not intended to **impose** any liability for costs associated with the surrogacy on any other parties to the arrangement. Such obligations, however, may be imposed by the agreement itself, see Section 6(b)(9).

SECTION 8. PARENTAGE UNDER APPROVED SURROGACY AGREEMENT.

(a) The following rules of parentage apply to surrogacy agreements approved under Section 6:

(1) Upon birth of a child to the surrogate, the intended parents are the parents of the child and the surrogate and her husband, if she is married, are not parents of the child unless the court vacates the order pursuant to Section 7(b).

(2) If, after notice of termination by the surrogate, the court vacates the order under Section 7(b) the surrogate is the mother of a resulting child, and her husband, if a party to the agreement, is the father. If the surrogate's husband is not a party to the agreement or the surrogate is unmarried, paternity of the child is governed by [the Uniform Parentage Act].

(b) Upon birth of the child, the intended parents shall file a written notice with the court that a child has been born to the surrogate within 300 days after assisted conception. Thereupon, the court shall enter an order directing the [Department of Vital Statistics] to issue a new birth certificate naming the intended parents as parents and to seal the original birth certificate in the records of the [Department of Vital Statistics].

Comment

Under Section 8(a), parentage of the child born pursuant to an approved surrogacy is vested in the intended parents where the order under Section 6 is still in effect. Notice of the birth of the child must be filed by the intended parents and the court, upon receipt of the notice, shall direct the issuance of a birth certificate naming the intended parents as parents. It should be noted that a birth certificate issued under this subsection might later be replaced by a birth certificate naming other individuals as parents of the child if an action to dispute the parentage of the intended parents filed under Section 9(d) is successful.

Section 8(b) deals with parentage where the surrogate has exercised her Section 7(b) right of recantation. It makes clear that the surrogate and her husband, if a party to the agreement, are the parents of the child in such a situation. Where the surrogate is unmarried or her husband was not a party to the agreement, paternity is left to the otherwise relevant state law. It should be noted, however, that if the surrogate has married or remarried since the order authorizing the surrogacy, her husband is not the father of the child. See Section 9(c).

Because under the Act (Section 1(3)) at least one intended parent must be genetically related to the child and Section 7(b) recantation is limited to those surrogates who have provided the egg, in all cases arising under Section 8(b) the intended father will be the genetic father. Thus, the interaction of Section 8(b) and the law of paternity may result in the legally recognized father (the intended father) and the legally recognized mother (the surrogate) being in different households. This situation, while regrettable, is not unique in family law and may precipitate litigation over custody. See *In re Baby M*, 537 A.2d 1227 (N.J. 1988) and the trial court order on remand, 14 Fam. L. Rep. 1276 (1988).

SECTION 9. SURROGACY: MISCELLANEOUS PROVISIONS.

(a) A surrogacy agreement that is the basis of an order under Section 6 may provide for the payment of consideration.

(b) A surrogacy agreement may not limit the right of the surrogate to make decisions regarding her health care or that of the embryo or fetus.

(c) After the entry of an order under Section 6, marriage of the surrogate does not affect the validity of the order, and her husband's consent to the surrogacy agreement is not required, nor is he the father of a resulting child.

(d) A child born to a surrogate within 300 days after assisted conception pursuant to an order under Section 6 is presumed to result from the assisted conception. The presumption is conclusive as to all persons who have notice of the birth and who do not commence within 180 days after notice, an action to assert the contrary in which the child and the parties to the agreement are named as parties. The action must be commenced in the court that issued the order under Section 6.

(e) A health-care provider is not liable for recognizing the surrogate as the mother before receipt of a copy of the order entered under Section 6 or for recognizing the intended parents as parents after receipt of an order entered under Section 6.]

Comment

Subsection 9(a) is intended to shield surrogacy agreements which include payment of the surrogate from attack under “baby-selling” statutes which prohibit payment of money to the natural mother in adoptions.

Section 9(b) is intended to acknowledge that the surrogate, as a pregnant woman, has a constitutionally-recognized right to provide for her health care and that of the unborn child.

Section 9(c) makes it clear that a man who marries the surrogate after the surrogacy authorization has been issued is neither a party to the original action nor the father of a resulting child, even if the surrogate exercises her recantation right under Section 7(b). It is felt that since he was not a party to the surrogacy agreement, he ought not be burdened with the status of parent. In the case of a recanting surrogate who has married since the original Section 6 order, she will be the mother and the intended father may be the legally recognized father under the jurisdiction’s ordinary paternity laws.

Subsection 9(d) should be read in connection with the parentage provision of Section 8(a). The presumption created by Section 9(d) is intended to provide a starting point for the determination of whether a child born to the surrogate was actually the product of the assisted conception performed pursuant to the agreement. For example, a surrogate may assert that the child was created by the union of her egg and her husband’s sperm. She and all other persons who have notice of the birth are given 180 days to commence an action to assert that the child was not the product of the assisted conception. It is intended that the substantive and procedural law governing such actions will be governed by the otherwise relevant state statutes concerning disputed parentage of a child.

Subsection 9(e) is designed to provide an incentive to the parties to the surrogacy to make hospital personnel aware of the existence of the arrangement and to protect the health care providers in case such notification has not been made.

[END OF ALTERNATIVE A]

ALTERNATIVE B

Comment

A state that chooses Alternative B shall consider Sections 10, 11, 12, 13, 14, 15, and 16, renumbered 6, 7, 8, 9, 10, 11, and 12, respectively.

[SECTION 5. SURROGATE AGREEMENTS. An agreement in which a woman agrees to become a surrogate or to relinquish her rights and duties as parent of a child thereafter conceived through assisted conception is void. However, she is the mother of a resulting child, and her husband, if a party to the agreement, is the father of the child. If her husband is not a party to the agreement or the surrogate is unmarried, paternity of the child is governed by [the Uniform Parentage Act].]

Comment

This section should be utilized by a jurisdiction which chooses not to give any efficacy to surrogacy arrangements. It recognizes, however, that some such agreements will continue to be achieved even though they are not enforceable at law. Therefore, it makes provision for the maternity and paternity of children who are born pursuant to such agreements. Note that Alternative B's Section 5 substitutes for Alternative A's Sections 5-9.

[END OF ALTERNATIVE B]

SECTION 10. PARENT AND CHILD RELATIONSHIP; STATUS OF CHILD.

(a) A child whose status as a child is declared or negated by this [Act] is the child only of his or her parents as determined under this [Act].

(b) Unless superseded by later events forming or terminating a parent and child relationship, the status of parent and child declared or negated by this [Act] as to a given individual and a child born alive controls for purposes of:

(1) intestate succession;

(2) probate law exemptions, allowances, or other protections for children in a parent's estate; and

(3) determining eligibility of the child or its descendants to share in a donative transfer from any person as a member of a class determined by reference to the relationship.

Comment

This provision is parallel to those provisions in adoption statutes which provide that once an adoption creates or negates a parent-child relationship, that relationship or negation of a relationship applies in all circumstances.

While strictly speaking subsection (b) may be redundant in light of subsection (a), it is included because of the importance of the situations listed herein. The introductory clause primarily is designed to deal with situations where a parent-child relationship established under this Act is later severed through the placement of a child for adoption or, conversely, situations where a parent-child relationship is negated by the Act but is later established by an adoption.

SECTION 11. UNIFORMITY OF APPLICATION AND CONSTRUCTION. This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

SECTION 12. SHORT TITLE. This [Act] may be cited as the Uniform Status of Children of Assisted Conception Act.

SECTION 13. SEVERABILITY. If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION 14. EFFECTIVE DATE. This [Act] shall take effect on _____ . Its provisions are to be applied prospectively.

SECTION 15. REPEALS. Acts or parts of acts inconsistent with this [Act] are repealed to the extent of the inconsistency.

SECTION 16. APPLICATION TO EXISTING RELATIONSHIPS. This [Act] applies to surrogacy agreements entered into after its effective date.